No. 85-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IOWA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR ANSCHUETZ & CO. GMBH AND MESSERSCHMITT-BOELKOW-BLOHM GMBH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Of Counsel:
DIETER G. LANGE
ANDREW N. VOLLMER
THOMAS JESTAEDT
WILMER, CUTLER & PICKERING
4 Carlton Gardens
London, SW1Y 5AA
England

ULRICH STÜRMER
Gereonshof 14-16
5000 Cologne 1
West Germany

GERHARD NAGORNY
Riethorst 2
D-3000 Hannover 51
West Germany

KURT E. BIEDERMANN
KROLL, TRACT, HARNETT, POMERANTZ & CAMERON
500 Fifth Avenue
New York, New York 10110

JAMES S. CAMPBELL
Counsel of Record
DAVID WESTIN
GARY BORN
CAROL F. LEE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH

NEAL D. HOBSON
MILLING, BENSON, WOODWARD, HILLYER, PIERSON & MILLER
1100 Whitney Building
New Orleans, LA 70130
Attorneys for Anschuetz & Co. GmbH

KEVIN H. GOOD, P.C.
STRASBURGER & PRICE
4300 Interfirst Plaza
901 Main Street
Dallas, Texas 75202
Attorneys for Messerschmitt-Boelkow-Blohm GmbH

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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This amicus curiae brief is submitted in support of petitioners Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism. By letters filed with the Clerk of the Court, petitioners and respondents-real parties in interest Dennis Jones, John George and Rosa George have consented to the filing of the brief.

INTEREST OF AMICI CURIAE

Amici curiae are two German manufacturing companies involved in cases pending before this Court. Amicus Anschuetz & Co. GmbH is the petitioner in No. 85-98, seeking review of the decision of the U.S. Court of Appeals for the Fifth Circuit in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985). Amicus Messerschmitt-Boelkow-Blohm GmbH is the petitioner in No. 85-99, seeking review of the decision by the same court in *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d

729, 731 (5th Cir. 1985). The panel deciding *Messerschmitt* followed the reasoning of the *Anschuetz* decision. On April 21, 1986, the Court granted the petition for certiorari in No. 85-99, but vacated its order on June 9, 1986 and instead granted certiorari in the instant case, No. 85-1695. The decision below, *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986), also followed the *Anschuetz* reasoning.

The cases in which amici are petitioners, like the present case, raise the question of what principles should guide U.S. courts in determining when litigants should use the procedures established by the Hague Evidence Convention to obtain extraterritorial discovery. Accordingly, the Court's decision in this case will directly affect the eventual disposition of the petitions in *Anschuetz* and *Messerschmitt*.

STATEMENT

As set forth in petitioner's brief, this case centers on a discovery dispute between French corporate defendants and private U.S. plaintiffs seeking to use domestic U.S. discovery methods to obtain information located in France. Accordingly, it is but a particular instance of the international conflicts that can arise when controversies between parties from different countries are brought before the courts of one country. Substantive and procedural rules usually differ substantially from one country to another, and the issue presented by this case is how U.S. courts should deal with this divergence in the area of pretrial discovery.

Sharp international differences exist on the subject of extraterritorial U.S. discovery. The liberal United States approach of permitting private litigants, with minimal judicial supervision, to comb each other's files and spend days deposing the executives of their opponents is sometimes disturbing even to litigants who are at home with the U.S. system. U.S. pretrial discovery is not merely disturbing but anathema to foreign parties accustomed to much more limited and carefully supervised evidence-

gathering procedures. At the same time, whatever their reservations may be about U.S. discovery in general, U.S. parties naturally believe that it would be fundamentally unfair to deprive them of information helpful to their position simply because the information happens to be located outside the United States.

In the face of this basic conflict, U.S. courts have taken two quite different approaches to extraterritorial discovery. First, U.S. courts have frequently invoked the discovery provisions of their procedural rules to order foreign nationals to produce documents,[1] answer interrogatories,[2] and provide witnesses for depositions,[3] disre-

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[1] *See, e.g.*, Pet. for Cert. 1a, 5a; *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 788 F.2d 1408 (9th Cir. 1986); *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), *pet. for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) [hereinafter "No. 85-98"]; *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 1633, *order for cert. vacated*, 106 S. Ct. 2887 (1986) [hereinafter "No. 85-99"]; *Lowrance v. Michael Weinig, GmbH*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 444 (S.D.N.Y. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 520-24 (N.D. Ill. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 604 (D. Del. 1971), *aff'd*, 487 F.2d 312 (3d Cir. 1973); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *Wilson v. Lufthansa German Airlines*, 108 A.D.2d 393, 489 N.Y.S.2d 575, 577 (1985).

[2] *See, e.g.*, Pet. for Cert. 1a, 5a; *Club Mediterranee v. Dorin*, 104 S. Ct. 1268 (1984); *Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 733 & n.16; *Lowrance v. Michael Weinig, GmbH*, 107 F.R.D. at 388-89; *Graco*, 101 F.R.D. at 520-24; *Murphy*, 101 F.R.D. at 361.

[3] *See, e.g., Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *Seuthe v. Renewal Prods., Inc.*, 38 F.R.D. 323 (S.D.N.Y. 1965); *Slade v. Transatlantic Fin. Corp.*, 21 F.R.D 146 (S.D.N.Y. 1957); *Schultz v. KLM Royal Dutch Airlines*, 21 F.R.D. 20 (E.D.N.Y. 1957); *Supine v. Compagnie Nationale Air France*, 21 F.R.D. 42 (E.D.N.Y. 1955); *Chemical Specialties Co. v. Ciba Pharmaceutical*

garding objections based on the foreign location of the evidence and the foreign nationality of the parties. This is the approach taken by the court of appeals in the present case and by the U.S. Court of Appeals for the Fifth Circuit in the two cases in which amici Anschuetz and Messerschmitt have petitioned for certiorari.[4] As long as the court has personal jurisdiction over the foreign person, U.S. law gives it the power to order actions that will take place outside the court's geographical jurisdiction.[5] If the foreign litigant has assets in the United States it may have no choice but to comply with such discovery orders.

Ignoring the expectations of foreign parties and the sovereign interests of foreign states, however, has serious consequences. Extraterritorial discovery has caused substantial conflict between the United States and its trading partners.[6] Sometimes this conflict is reflected in official diplomatic protests lodged with our State Department.[7] In addition, the vigorous pursuit of U.S. discovery

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Prods., 10 F.R.D. 500 (D.N.J. 1950); *Producers Releasing Corp. de Cuba v. PRC Pictures*, 8 F.R.D. 254 (S.D.N.Y 1948); *Alfred Bell & Co. v. Catalda Fine Arts*, 5 F.R.D. 327 (S.D.N.Y. 1946).

[4] Pet. for Cert. 7a; *Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 732.

[5] *See, e.g., Societe Internationale v. Rogers*, 357 U.S. 197, 199-200, 204-06 (1958).

[6] *See, e.g., Restatement (Revised) of Foreign Relations Law of the United States* § 437, Reporter's Note 1 (Tent. Draft No. 7, April 10, 1986), adopted May 14, 1986 ("no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States").

[7] *See* Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 1a-4a (diplomatic notes from the Federal Republic of Germany); *id.* at 5a-10a (diplomatic note from France); Reply Brief of Petitioner, No. 85-98, at 1a-2a (diplomatic note from France), 3a-4a (diplomatic note from the United Kingdom); Brief for the United States as Amicus Curiae, *Volkswagenwerk AG v. Falzon*, No. 82-1888, at 1a-10a (diplomatic notes from the Federal Republic of Germany).

These are only the most recent in a long line of foreign protests against extraterritorial U.S. discovery. The Reports of the International Law Association contain numerous examples of foreign protests asserting that U.S. demands for document production violate their sovereign rights under international law. Report of the Fifty-First Conference, International Law Association 565-92 (Tokyo 1964); Report of the Fifty-Second Conference, International Law Association 132 (Helsinki 1966).

abroad has led numerous foreign governments to enact "blocking statutes" making it illegal to comply with discovery demands in U.S. litigation.[8]

There is a second approach available, however, to U.S. courts seeking information from abroad in private civil cases: use of the Hague Evidence Convention,[9] a multilateral treaty specifically designed "to improve mutual judicial cooperation in civil or commercial matters" with respect to evidence-taking.[10] In providing "methods to

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[8] *See* Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Fordham L. Rev. 877 (1982); Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 Int'l Law. 61 (1983); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 596-97 (1981).

[9] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter cited as "Hague Evidence Convention"].

[10] In response to a request from the United States government, the Convention was negotiated and drafted between 1968 and 1970 under the auspices of the Hague Conference on Private International Law. Since that time, seventeen countries have ratified the Convention, including the United States (in 1972), France (in 1974), and Germany (in 1979). The legislative history (or *travaux preparatoires*) of the Convention has been compiled by the Permanent Bureau of the Hague Conference. Conference de La Haye de Droit International Prive, *Actes et Documents de la Onzieme Session, Tome IV, Obtention des preuves a l'etranger* (1970) [hereinafter cited as "Convention History"]. *See generally* 1 B. Ristau,

reconcile the differing legal philosophies of the Civil Law, Common Law and other systems," [11] as well as "methods to satisfy doctrines of judicial sovereignty," [12] the Convention establishes the "letter of request" as the principal means of taking evidence from the territory of nations party to the Convention.[13] A letter of request, like the customary letter rogatory, is a judicial request addressed to a foreign sovereign authority requesting it to obtain evidence located on its territory. Unlike customary letters rogatory, letters of request must be executed expeditiously by Contracting Parties unless the request comes within certain limited exceptions.[14] If necessary, receiving states must apply "the appropriate measures of compulsion" available under internal law.[15]

International Judicial Assistance (Civil and Commercial), Part V, at 177-268.5 (1984).

[11] Convention History, *supra* note 10, at 55 (Report of the Special Commission).

[12] *Id.*; *see id.* at 83 (debates); Message From President Transmitting Hague Evidence Convention, S. Exec. A., 92d Cong., 2d Sess. VI (1972).

[13] Articles 10 through 14. The Convention provides two other methods of taking evidence. Article 17 permits a commissioner appointed by a court of the requesting state to take evidence in the requested state provided that: (1) no compulsion is used; (2) permission has been given by the requested state; and (3) any conditions imposed by the requested state are observed. Articles 15 and 16 permit diplomatic officers or consular agents to take evidence from their own nationals (typically with few restrictions) or from others (with restrictions similar to those under Article 17).

[14] A receiving state may refuse to execute a letter of request only if it seeks privileged information (Art. 11); if it requests performance of non-judicial functions or actions prejudicial to the state's "sovereignty or security" (Art. 12); or if it was issued for purposes of "pre-trial discovery of documents as known in Common Law countries," insofar as the individual country has reserved the right to refuse (Art. 23). Any state that refuses to execute a letter of request is required immediately to inform the requesting authority and advise it of the reasons for the refusal (Art. 13).

[15] Art. 10.

Many state and federal courts in the United States have sought to avoid interjurisdictional conflict in foreign discovery by using these Convention procedures rather than discovery orders under the Federal Rules of Civil Procedure.[16] In the Federal Republic of Germany, the designated authorities have received approximately 181 letters of request from U.S. courts since the treaty entered into effect with the United States in 1979.[17]

The present case requires this Court to determine the extent to which U.S. law constrains U.S. courts in choosing between these two alternative means of seeking information from abroad. Specifically, the Court must decide whether applicable legal principles permit unlimited U.S.-style discovery despite the international conflict that inevitably results, or whether such principles require U.S. courts to accommodate domestic and foreign interests by using discovery procedures established by the Hague Evidence Convention.

SUMMARY OF ARGUMENT

The principle of comity is well established in federal law. This principle, when properly analyzed and applied, provides the necessary guidance for U.S. courts called upon to decide when litigants should use the procedures established by the Hague Evidence Convention to discover

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[16] *See, e.g., Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d 492, 504-06 (W. Va. 1985); *Th. Goldschmidt AG v. Smith*, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); *General Elec. Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223-24 (N.D. Ill. Sept. 15, 1983); *Pierburg GmbH v. Superior Court*, 137 Cal. App. 3d 238, 243-44, 186 Cal. Rptr. 876, 879-80 (1982); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision).

[17] Statistics provided by Dr. Christof Boehmer, Federal Ministry of Justice, Bonn, Federal Republic of Germany.

information located abroad. Comity analysis requires careful consideration of the nature and weight of the foreign, domestic, and international system interests implicated by extraterritorial pretrial discovery and the extent to which those interests can or cannot be accommodated by a particular method of discovery.

The court of appeals completely misunderstood the requirements of comity when it decided that, as long as evidence located abroad is to be delivered in the United States, there is no need to consider the interests of foreign sovereigns before ordering discovery under U.S. procedures. To the contrary, whenever a U.S. court orders information to be produced from within the territory of another country, that state's sovereignty is implicated for comity purposes—even if the information is turned over to the opposing side in the United States.

When Hague Convention procedures offer a litigant the prospect of obtaining useful information, those procedures adequately accommodate the U.S., foreign, and international system interests implicated by extraterritorial U.S. discovery. Applying a proper comity analysis, therefore, this Court should adopt the general rule that Convention procedures must be used in the first instance, except in those rare cases in which the U.S. litigant shows that no useful information can be obtained through the Convention. Only after exhausting Hague Convention procedures should U.S. courts consider ordering production of information from within the territory of a foreign nation objecting to such production.

ARGUMENT

I. U.S. Discovery of Information Located Within the Territory of a Foreign Country Implicates the Sovereign Interests of that Country, Even If the Information Will Be Delivered in the United States.

The court of appeals' ruling in this case rests on its assumption that ordering information to be produced from abroad can infringe foreign sovereign interests only

if the physical act of production occurs within the foreign country's borders.[18] Because the production of information from French sources was specified to take place in the United States, the court of appeals decided there was no need even to try to reconcile the interests of France with those of the United States. In so ruling, the court of appeals utterly disregarded the sovereign interests of France. Use of U.S. discovery methods to demand production of information located in a foreign country implicates that country's sovereignty, even if the physical delivery of the information takes place in the United States.[19]

That U.S. courts do trench upon legitimate interests of foreign sovereigns in ordering parties to bring information located abroad to this country is shown most directly by the statements of foreign governments themselves.[20] Certainly the fact that physical production was to occur in the United States did not assuage Germany's concern in Nos. 85-98 and 85-99 that the court-ordered discovery "violates the Federal Republic of Germany's sovereignty."[21] Similarly France, in enacting blocking legislation in response to U.S. discovery, made clear that it was to cover all information to be transferred from France to a foreign country for production there.[22] The

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[18] Pet. for Cert. 4a ("the civil law signatories' concern for judicial sovereignty would only be threatened when discovery procedures that are typically considered a judicial function are actually undertaken within the signatories' borders by a private party"). *Accord Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 731; *Graco*, 101 F.R.D. at 521; *Murphy*, 101 F.R.D. at 362-63.

[19] Meessen, *The International Law on Taking Evidence From, Not In, a Foreign State: The Anschütz and Messerschmitt Opinions of the United States Court of Appeals for the Fifth Circuit* (March 31, 1986), at 22a-28a, originally submitted to this Court in Nos. 85-98 and 85-99 and reprinted for the convenience of the Court as the Appendix to this brief.

[20] *See supra*, note 7.

[21] Brief for the Federal Republic of Germany as Amicus Curiae, No. 85-98, at 3 (supporting petition for writ of certiorari).

[22] Article 1-bis, Law No. 81-550 of July 17, 1980, *reprinted in*, J. Fedders, J. Harris, R. Olsen & B. Ristau, 2 *Transnational Litiga-*

grave concerns expressed by America's trading partners are based on where the information is located, for they consider the holders of such information to be entitled to the protection of local law.[23]

Such strong statements by friendly nations like Germany and France are entitled to substantial weight in and of themselves. These objections are particularly telling in a case such as this, however, because they are not prompted by the mere desire to protect their nationals from the vagaries of U.S. litigation. To the contrary, the reason that such nations react vehemently to U.S.-style discovery of information located within their borders is that it undermines long-established procedural principles protecting persons and businesses within their borders from what those nations regard as undue intrusions upon privacy and business secrecy.[24]

An examination of German law amply demonstrates this point. The central protection provided by the Federal Republic of Germany for personal and business secrecy is the requirement that all evidence-taking be conducted by judicial authorities. After the filing of the initial pleadings, it is the judge—not the parties—who decides what evidence should be taken and conducts almost all of

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tion: Practical Approaches To Conflicts and Accommodations 1329 (1984); *see* Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 10a (diplomatic note from France).

[23] *See* Report of the Fifty-Second Conference, International Law Association 132 (Helsinki 1966) (reprinting Report of Committee on the Extra-Territorial Application of Restrictive Trade Regulation, American Branch of the I.L.A.) (foreign protests are "founded upon the contention that an order for such production, issued within the territory of a prosecuting State, and requiring acts in the territory of another State, constitutes an attempt by the former to exercise its public power indirectly in the territory of the latter where admittedly such power could not be exercised directly"); Meessen, *supra* note 19, at 22a-28a (Appendix).

[24] *See generally* Meessen, *supra* note 19, at 22a-28a (Appendix).

the evidence-taking at one or more hearings or "conferences." [25]

Moreover, there are three particular aspects of German procedure that ensure that the judge, in exercising this authority, will not intrude on the privacy interests of the parties recognized under German law. First, "in diametrical contrast to, for example, Federal Rule Civil Procedure 26, German courts will not grant a motion for the taking of evidence that is not directed at *proving* plausible facts, but is rather designed to *produce* such facts." [26] Second, German law recognizes a number of constitutional and statutory privileges. These privileges include the right to refuse to testify about business secrets,[27] professional confidences,[28] matters that might lead to self-incrimination, and the like.[29] Third, German law narrowly circumscribes the situations in which a German court will compel the disclosure of documents.[30] The ulti-

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[25] Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826-28 (1985); Heck, *Federal Republic of Germany and the EEC*, 18 Int'l Law. 793, 794-95 (1984); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 Harv. L. Rev. 1193, 1206-07, 1247-49 (1958).

[26] Heck, *supra* note 25, at 794 (emphasis added); Kaplan, *supra* note 25, at 1234, 1246-47.

[27] Baumbach, Lauterbach, Albers, Hartmann, *Zivilprozessordnung* (ZPO) § 384(4) (44th ed. 1986); Schlosser, *Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen*, 94 Zeitschrift fuer Zivilprozess 369, 402-05 (1981). The protection for business secrets has its roots in the guarantee of property rights in the German Constitution. Article 14, Basic Law.

[28] Kaplan, *supra* note 25, at 1238 & n.186.

[29] *Id.* at 1238 & n.187.

[30] *Id.* at 1240-41. A party has a right to a document referred to in its adversary's pleadings. Beyond this, German substantive law only grants a right to obtain documents that were prepared in the requesting party's interest, that memorialize a legal relationship, or that embody certain types of negotiations. *Id.* at 1240 & n.198; ZPO § 422; Buergerliches Gesetzbuch (BGB) § 810. Although German law does not require disclosure of documents outside these exceptions, witnesses can be required to testify orally about the

mate source of these limits on the scope of evidence-taking is a principle of proportionality laid down by the German constitution.[31]

Against this backdrop, it is plain why nations such as Germany regard a U.S. court order for German nationals to produce information located in Germany for use in U.S. litigation as an invasion of German sovereignty.[32] Under U.S. discovery rules, parties may delve without judicial supervision into an extremely broad range of matters by means of depositions, interrogatories, document requests, inspections of property, and other meth-

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contents of documents (subject to relevancy and privilege limitations). Court of Appeals (Munich), *Petition for Review of an Administrative Ruling under Secs. 23 et seq., EGGVG*, Docket No. 9 VA 3/80, 20 Int'l Leg. Mat. 1049 (1981).

[31] Meessen, *supra* note 19, at 27a-28a (Appendix) (explaining principle of proportionality); Heck, *supra* note 25, at 794; 38 Entscheidungen des Bundesverfassungsgerichts 105, 114 (1975) ("the witness' sphere of privacy and other personal rights guaranteed under Articles 2 ¶ 1 and 1 ¶ 1 of the Basic Law may not be encroached upon by procedural law and its application by parties to a proceeding").

[32] German law forbids German courts from sending written interrogatories to witnesses abroad. § 39 Rechtshilfeordnung fuer Zivilsachen (ZRHO), *reprinted in* 2 Buelow, Boeckstiegel, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, GI/900 (1985); *see also* Convention History, *supra* note 10, at 21. The Solicitor General has suggested that European courts would be willing to order production of evidence located abroad, Brief for the United States as Amicus Curiae, Nos. 85-98 and 85-99, at 16 n.18. He cites the English summary of a German article which produces no actual case law in support of this erroneous assertion. Instead, the article relies on fallacious extrapolations from certain specialized areas of substantive law, such as paternity and tax law. Moreover, the article cited by the Solicitor General deals with the much less troublesome issues that arise when a witness from one civil law country, *e.g.*, Italy, is asked to give evidence in another civil law country, Germany, where he will enjoy essentially the same substantive and procedural protections as he is afforded at home. *See* Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 17-21 (1985).

ods.[33] The requirement of relevance poses no more than a minimal restriction; Rule 26 of the Federal Rules of Civil Procedure is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[34] When these techniques are used to demand sweeping and unsupervised disclosure of information located in a foreign country, such as Germany, they disrupt the protections for privacy and business secrecy provided by that country's legal regime. The resulting encroachment on that nation's judicial sovereignty cannot be swept aside merely by asserting—as did the court of appeals in this case—that the "discovery" takes place in the United States rather than abroad.

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[33] In No. 85-98, for example, document requests included: all documents relating to the design, testing, inspection, steering emergencies, assembly, installation, or integration of Anschuetz products installed on ships before their "going to sea" from 1974 to the present; all documents relating to information given Anschuetz representatives concerning negotiation of contracts on behalf of Anschuetz between 1974 and 1983; and all information Anschuetz gave its representatives for conduct of Anschuetz business. *See* Pet. for Cert., No. 85-98, at 4 n.2.

[34] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). *See also United States v. Procter & Gamble*, 356 U.S. 677, 679 n.2 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-10 (1947).

The unbridled discretion of litigants, and the resulting discovery abuses, have been criticized by members of this Court, along with many observers and members of the bar. Advisory Committee Notes to 1983 Amendments to Rule 26 of the Federal Rules of Civil Procedure (quoting *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring)); ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse 9 (1980); 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), 85 F.R.D. 521, 522 (1980).

II. The Principle of International Comity Requires U.S. Courts To Accommodate the Interests of Foreign Countries by First Using the Hague Evidence Convention To Obtain Information Located Within Their Territories.

Whenever foreign sovereign interests are infringed by extraterritorial discovery, the principle of international comity should temper U.S. courts' exercise of their power to order that foreign parties bring information to this country. Moreover, although the comity principle requires consideration of a number of factors in determining how to apply U.S. discovery law in cases implicating foreign interests, careful analysis demonstrates that these factors point to a general rule in extraterritorial discovery cases such as the one presented here: In all but rare cases, comity requires initial use of Hague Evidence Convention procedures before means of discovery objectionable to the foreign country are considered.

A. In Cases Implicating Foreign Sovereign Interests, Comity Requires that U.S. Courts Seek To Accommodate Domestic, Foreign and International System Interests.

U.S. law has always required that U.S. courts, to the extent practicable, consider foreign sovereign interests and attempt to accommodate them in adjudicating disputes affecting such interests. This requirement has become known as the principle of "international comity." [35]

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[35] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3348 (1985); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Windward Shipping Co. v. American Radio Ass'n.*, 415 U.S. 104, 112-13 (1974); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762, 765 (1972); *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 575 (1926); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918); *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Wildenhus's Case*, 120 U.S. 1, 12 (1887); *The Belgenland*, 114 U.S. 355, 363 (1885); *Bank of Augusta v. Earle*, 38 U.S. 517, 589-90 (1839); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 360 (1827); *Harvey v. Richards*, 11 F. Cas. 746, 756 (C.C.D. Mass. 1818) (No. 6,184). The principle of comity entered the jurisprudence of this Court in the margin of *Emory v. Grenough*, 3 U.S. (3 Dall.) 368, 369 n. (1797) (Huber's third maxim from *De conflictu legum*).

As this Court said in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

> 'Comity,' in the legal sense . . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.

As this definition indicates, three kinds of interests must be analyzed in applying the general principle of comity in particular cases: (1) relevant domestic interests reflected in U.S. laws and policies ("the rights of its own citizens"); (2) relevant foreign interests reflected in the laws and policies of affected foreign countries ("the legislative, executive or judicial acts of another nation"); and (3) the mutual interests of all nations in the maintenance of a smoothly functioning international legal regime ("international duty and convenience").

In making the comity analysis, this Court has not allowed itself to become preoccupied with whether expansively conceived U.S. interests can be fully satisfied.[36] Instead, it has asked whether both domestic and foreign interests can be adequately served by reconciling the central concerns of both, and whether alternative courses of action will promote or impede the development of the international legal system.[37]

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[36] *Cf. The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"); *Restatement (Second) of Conflict of Laws* § 6, comment f, at 14 (1971).

[37] *See, e.g., Mitsubishi v. Soler*, 105 S. Ct. at 3348 ("[c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context"); *Scherk v. Alberto-Culver Co.*, 417 U.S.

Historically the application of the principle of comity by this Court has often generated general rules governing recurring factual situations.[38] Such rules have been

506, 516-17 (1974) ("achievement of the orderliness and predictability essential to any international business transaction"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959) ("the interacting interests of the United States and of foreign countries"); *Lauritzen v. Larsen*, 345 U.S. 541, 582 (1953) ("rules designed to foster amicable and workable commercial relations"); *Hilton v. Guyot*, 159 U.S. at 191 ("[i]f a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations") (quoting *Bradstreet v. Neptune Ins. Co.*, 3 Sumner 600, 608-09 (C.C.D. Mass. 1839)); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) ("[t]he world being composed of distinct sovereignties . . . whose mutual benefit is promoted by intercourse with each other"). *Cf. Restatement (Second) of Conflict of Laws* § 6, comment d (1971) ("[a]doption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result").

Comity as recognized in United States law is a requirement under international law. Meessen, *supra* note 19, at 18a-21a (Appendix) (discussing principles of international law that underlie the U.S. law of comity). Comity as a requirement of international law was recently recognized by the American Law Institute when it adopted the *Restatement (Revised) of Foreign Relations Law of the United States* § 403, comment a (Tent. Draft No. 7, April 10, 1986), adopted May 14, 1986. *See also* J. Story, *Commentaries on the Conflicts of Laws, Foreign and Domestic* § 35 (8th ed. 1883) ("[t]he true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return"); *id.*, § 38 (" 'comity of nations' . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another").

[38] General principles requiring consideration of a number of factors have produced rules in other areas of the Court's jurisprudence as well. For example, the Court has promoted "comity and federalism" in the context of state-federal relations by resort

established, for example, in the choice of law area[39] and most strikingly in choice-of-forum cases.[40] The principle of international comity has also generated rules of maritime law[41] and rules concerning application of the doc-

to general rules. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860, 4862-63 (U.S. 1986) (federal court should not enjoin pending state administrative proceeding by civil rights commission); *Younger v. Harris*, 401 U.S. 37, 41-45 (1971) (federal court should not enjoin pending state criminal prosecution).

Similarly, in the area of procedural due process, the Court has derived rules based on factors such as the importance of the individual interest at stake, the likely benefits of procedural safeguards, and the effect on governmental interests. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493-96 (1985) (before terminating public employee who can be discharged only for cause, employer must give notice and an opportunity to respond); *Mathews v. Eldridge*, 424 U.S. 319, 332-49 (1976) (no pretermination evidentiary hearing required before terminating Social Security disability benefits; post-termination hearing sufficient); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972) (evidentiary hearing with cross-examination required before revoking parole); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (pretermination evidentiary hearing required before terminating welfare benefits).

[39] *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. at 303-04 (act of state doctrine "rests at last upon the highest considerations of international comity and expediency"); *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) ("the true spirit of international comity" requires U.S. courts to recognize a bankruptcy reorganization plan in a foreign court); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. at 765 (opinion of Rehnquist, J.) ("[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns").

[40] *See, e.g., Mitsubishi v. Soler*, 105 S. Ct. at 3348; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("the forum clause should control absent a strong showing that it should be set aside").

[41] *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926); *Wildenhus's Case*, 120 U.S. 1 (1887); *The Belgenland*, 114 U.S. 355 (1885); *The*

trine of sovereign immunity.[42] And the Court's analysis in *Hilton v. Guyot* itself produced the general rule, albeit later criticized, that U.S. courts will enforce judgments of foreign courts only insofar as the foreign courts would themselves enforce U.S. judgments in similar circumstances.[43]

In the present case, there can be no question but that the principle of comity should be applied to determine how the requested extraterritorial discovery should be achieved. As explained above, the court of appeals was plainly mistaken in concluding that comity had no place here because all foreign interests had been eliminated once it was specified that production of the information sought should occur in the United States. The true issue before the Court, therefore, is how the factors in a comity analysis are to be assessed in situations such as this, and to what extent the outcome can be expected to vary from case to case.

B. Comity Requires U.S. Courts To Use the Hague Convention in the First Instance To Obtain Information Located Abroad in Signatory Countries.

Given the nature of discovery disputes such as this, it is difficult to apply the general principle of comity and not conclude that U.S. courts should use the agreed-upon procedures of the Hague Evidence Convention before they pursue discovery techniques that are unacceptable to foreign countries. Examination of the relevant comity considerations demonstrates that the U.S. court should

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Scotia, 81 U.S. (14 Wall.) 170 (1871); *Brown v. Duchesne*, 60 U.S. (How. 19) 183 (1856); *The Schooner Exchange v. McFaddon*, 11 U.S. (Cranch 7) 116 (1812).

[42] *See First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) (based on respect for "principles of comity between nations," presumption that for purposes of sovereign immunity, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

[43] 159 U.S. 113 (1895).

always use the Hague Convention in the first instance, except in rare cases where the requesting party demonstrates that Convention procedures will produce no useful information.[44] In addition to the historical practice of deriving general rules from a comity analysis, there are powerful pragmatic reasons why this Court should enunciate a general rule, rather than leaving it to individual trial courts to make the comity analysis on a case-by-case basis.

1. *First Use of the Hague Convention Substantially Accommodates the Interests of U.S. Litigants in Obtaining Discovery.*

Litigants in U.S. courts have a legitimate interest in obtaining evidence from abroad that may assist them in preparing their case. The Hague Convention protects that interest.[45] The drafters of the Hague Convention designed the letter of request procedure to provide "a method acceptable to the State of execution, and also utilizable by the State of origin."[46] Receiving countries have honored their treaty obligations to execute these letters of request expeditiously and to use compulsion if necessary.[47]

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[44] *See Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d at 504-06; *Volkswagenwerk AG v. Superior Court*, 123 Cal. App. 3d 840, 857-59, 176 Cal. Rptr. 874 (1981).

[45] In this respect, the instant case differs materially from *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), a case in which this Court upheld a discovery order requiring the Swiss plaintiff to produce documentary evidence located in Switzerland relating to the validity of its claim. In *Societe Internationale*, there was no international agreement such as the Hague Convention that permitted effective discovery of the material sought; to the contrary, production of the information would have violated Swiss law.

[46] Convention History, *supra* note 10, at 83.

[47] As a recent report on the Convention by the Permanent Bureau of the Hague Conference observed, "[r]efusals to execute turn out to be very infrequent in practice." Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Leg. Mat. 1425, 1431 (1978).

In all signatory countries, letters of request may be used to obtain testimony by witnesses.[48] To be sure, the differing procedures and customs of the various countries may cause the form of the information obtained to differ somewhat from that typical under U.S.-style discovery. For example, in Germany the court will conduct the initial questioning of each witness. But in order to honor its treaty obligation under Article 9 to comply where possible with requests that special methods or procedures be followed,[49] Germany permits counsel for the parties to examine the witnesses. Upon request, German courts will also authorize verbatim recording of the testimony. In addition, Germany, like all signatory countries, executes letters of request seeking answers to interrogatories or admissions by parties.

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[48] In 1981, for example, the Munich Court of Appeals upheld a decision of the Bavarian Ministry of Justice granting a U.S. letter of request to depose named officers of a German company in connection with a U.S. patent infringement/antitrust action. Court of Appeals (Munich), *Petition for Review of an Administrative Ruling Under Secs. 23 et seq., EGGVG*, Docket No. 9 VA 4/80, *reprinted in* 20 Int'l Leg. Mat. 1025 (1981). The German court stated in part:

> The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of 'pre-trial discovery' which is unknown in German procedural law, but no[t] unfamiliar to Germany's treaty partner.

20 Int'l Leg. Mat. at 1036-37.

[49] *See* Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters 16, *reprinted in* 24 Int'l Leg. Mat. 1668, 1674-75 (1985) [hereinafter "1985 Report on Convention Operation"] (signatories have shown "great openness . . . towards admitting application of each other's procedures on their territory . . . . the courts in civil law countries generally will allow for depositions to be taken 'common law style' if so requested").

Despite the demonstrated availability of Hague Convention procedures for obtaining information from abroad, some litigants in U.S. courts have raised three objections to using such procedures even as a matter of first resort. These objections are (1) that they will not obtain documents; (2) that using Convention procedures will be costly and/or time-consuming; and (3) that doing so will give foreign litigants an unfair advantage. None of these objections has merit.

With respect to the availability of documents, Germany has exercised its right under Article 23 to limit its obligation to produce documents.[50] As part of a trend among signatories toward limiting Article 23 reservations,[51] however, the German government has drafted new regulations that would permit pretrial production of specified and relevant documents in response to letters of request.[52] After comments are received on this draft, the German Ministry of Justice plans to obtain consent from the Bundesrat; the regulations will then go into effect. Moreover, even now (before the adoption of new regulations), German law permits deponents to be questioned concerning the contents of specific documents in executing letters of request pursuant to the Convention.[53] And, in any

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[50] 7 Martindale-Hubbell Law Directory, pt. 7, at 16. By ratifying the Convention, the United States accepted the possibility that other signatories might make Article 23 declarations.

[51] *See* 1985 Report on Convention Operation, *supra* note 49, 24 Int'l Leg. Mat. at 1678 ("[t]he tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame—or, to the extent that they have not yet done so, to limit—their reservations [along lines that permit discovery of specific documents]").

[52] Such regulations were specifically contemplated by the German statute implementing the Convention. Bundesgesetzblatt 1977 I 3106.

[53] In its diplomatic note of April 8, 1986, the Federal Republic of Germany stated that, "[a]lthough the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pretrial stage, witnesses may be questioned by German

event, litigants in U.S. courts complaining about the Hague Evidence Convention have never explained why their purported inability to obtain information in the form of documents means that they should be entirely excused from seeking information in the form of deposition testimony, answers to interrogatories, and requests for admission—all of which they can obtain through the Convention.

Nor is there anything to suggest that first use of the Convention procedures will generally be more costly or time-consuming for litigants than exclusive use of direct U.S. discovery. To the extent that the Convention is used, lawyer time will simply be spent in discovery under the Convention's rules rather than under federal or state rules.[54] Moreover, we note that party-controlled discovery under the Federal Rules of Civil Procedure is not known for its expedition or cost-effectiveness.[55]

Finally, we recognize the legitimate U.S. interest in assuring that U.S. nationals enjoy discovery opportunities comparable to those of their foreign adversaries.[56] But

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courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany." Petitioner's Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 2a. *See* 1985 Report on Convention Operation, *supra* note 49, 24 Int'l Leg. Mat. at 1674-75; Court of Appeals (Munich), *supra* note 48, 20 Int'l Leg. Mat. at 1037 ("the witnesses named are to be examined with respect to the documents which are identified by date and subject matter as to their origin, content, business purpose and economic impact"); Meessen, *supra* note 19, at 12a-15a (Appendix).

[54] To the extent the Convention's procedures require parties to formulate their discovery requests more carefully, use of the Convention may actually result in lower costs to U.S. litigants. *See* Langbein, *supra* note 25, at 846.

[55] 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), 85 F.R.D. 521 (1980).

[56] *See Anschuetz*, 754 F.2d at 606; *Messerschmitt*, 757 F.2d at 731; *Graco*, 101 F.R.D. at 521.

this interest does not require U.S. courts to ignore the Hague Evidence Convention; instead they should exercise their ample discretionary powers to control all the discovery in the case in order to assure fairness to both parties. Under the Federal Rules, the court can protect a party from oppressive discovery by its adversary.[57] For example, should requiring first resort to Hague Convention procedures somehow put one litigant at a discovery disadvantage, the court could postpone that party's obligation to respond to discovery requests in order to prevent any possible unfairness.[58] By exercising such powers, the U.S. court can easily cope with the unusual case in which first use of Hague Convention procedures might disadvantage one of the litigants vis-a-vis the other.[59]

2. *First Use of the Hague Convention Substantially Accommodates Foreign Sovereign Interests.*

It should be apparent that, when U.S. courts need information from a country that objects to U.S.-style discovery, first use of the Hague Convention will respect that country's sovereignty to a much greater degree than an approach that ignores the Convention. Signatory countries have consented to the use of Convention procedures and have bound themselves to honor such requests. Nevertheless, the court of appeals in this case and several other federal courts have somehow persuaded themselves that first use would be insulting to foreign governments.[60]

The best evidence of foreign government sensibilities is the statements of foreign governments themselves—in this

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[57] Fed. R. Civ. P. 26(c)(2)-(4) (court may "make any order which justice requires" to limit discovery, including an order permitting discovery only on specified terms and conditions, or by a different discovery method, or limited in scope to certain matters).

[58] Fed. R. Civ. P. 26(c)(2) (court's protective order may designate time at which discovery may be had).

[59] Wright & Miller, 8 *Federal Practice & Procedure* § 2040 (1970 & 1986 Supp.).

[60] Pet. for Cert. 7a; *Anschuetz*, 754 F.2d at 613; *Graco*, 101 F.R.D. at 523-24; *Murphy*, 101 F.R.D. at 361 n.2.

case and elsewhere—rather than the unsupported surmises of U.S. courts. At the 1985 conference on the operation of the Hague Evidence Convention, for example, the German official representatives stated that "[w]here the court of a Contracting State orders witnesses or documents to be produced in its own country, the Convention, though not exclusive, should be first applied, before recourse may be had to that court's own, non-treaty rules for the taking of evidence abroad." [61]

Even if use of the Convention is followed by discovery orders pursuant to the Federal Rules, as discussed in Part C *infra*, foreign sovereign interests will be served by the use of the Convention.[62] First, review of evidence provided through the Convention will permit the parties and the court to ascertain what other evidence located abroad is truly necessary for the litigation. This process is likely to narrow the scope of the discovery dispute. There will be less intrusion on foreign sovereignty if discovery is limited to what a U.S. court has determined, or the parties have agreed, to be truly necessary.

Second, in assessing what is truly necessary, the U.S. court and the parties will have the benefit, pursuant to Article 13 of the Convention, of the foreign central authority's or court's reasons for objecting in whole or in part to a letter of request. As this Court has recently noted, federal judges have "little competence in determining precisely when foreign nations will be offended by particular acts." [63] Providing a channel of direct communication from the foreign nation to the U.S. court on the particular issues of the case will provide at least a partial solution, if this Court makes clear that U.S. courts should give foreign explanations the respectful attention that comity requires.

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[61] 1985 Report on Conference Operation, *supra* note 49, 24 Int'l Leg. Mat. at 1678; *see* Brief for the Federal Republic of Germany as Amicus Curiae, No. 85-98, at 7-9.

[62] *Cf.* Meessen, *supra* note 19, at 30a (Appendix).

[63] *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 194.

3. *First Use of the Hague Convention Promotes the Development of the International Legal System.*

Use of the Convention for extraterritorial discovery also promotes the mutual interest of the United States and its treaty partners in a smoothly functioning international system for resolving disputes that cross national borders.[64] The values served by such a system include predictability, fairness, reciprocity, mutual respect for sovereignty, and ease of commercial intercourse.[65] A rule requiring first use of the Convention would tend to redirect extraterritorial U.S. discovery into an internationally accepted channel. It would promote reciprocal communication between foreign and U.S. authorities about the nature of their competing policies and interests concerning discovery and thus tend to reduce or eliminate conflicts between those interests. First use of the Convention would avoid foreign parties' perceptions of unfairness and the stormy confrontations that have resulted when the U.S. courts show no respect for interests safeguarded by foreign legal regimes. These results would clearly benefit the international legal order as well as the interests of nations, courts and litigants in particular cases.

More widespread use of Convention procedures would make it possible to realize the Convention's full potential for "improv[ing] mutual judicial cooperation." [66] In *Mitsubishi v. Soler*, this Court observed that "the potential of [international arbitral] tribunals for efficient disposition of legal disagreements . . . has not yet been tested." [67] This is equally true of the Hague Evidence

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[64] In addition, as explained by Professor Meessen in his opinion, *supra* note 19, at 18a-21a, 29a-31a (Appendix), first use of Convention procedures avoids violation of the international law doctrines underlying U.S. principles of comity.

[65] See *supra*, note 37. *See, e.g.*, Maier, *Extraterritorial Jurisdiction At a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 303-04, 315 (1982); *Restatement (Second) of Conflict of Laws* § 6, comment d (1971).

[66] Recitals, Hague Evidence Convention.

[67] 105 S. Ct. at 3360.

Convention. Although courts in civil law countries routinely use the Convention to obtain evidence in the United States and elsewhere, U.S. courts and litigants have hitherto been reluctant to forgo standard U.S. discovery rules and proceed under the now unfamiliar Convention procedures. U.S. courts have only issued 181 letters of request to German courts since the Convention came into force in 1979, compared to the 188 requests issued by German authorities to U.S. officials in 1985 alone.[68] If the Convention is "to take a central place in the international legal order," [69] performing its intended role of bridging the gap between civil law and common law systems,[70] then U.S. courts must follow a first use rule and use the Convention to the fullest extent.

4. *This Court Should Set Forth a General Rule that Hague Convention Procedures Should Be Exhausted.*

As set forth above, the interests of the U.S. litigant, the foreign sovereign, and the international system can best be accommodated in the present case if the procedures of the Hague Evidence Convention are exhausted before other means of discovery are explored. This conclusion does not depend on facts peculiar to this case.

In the vast majority of cases involving discovery of information from the territory of a signatory to the Convention, the facts relevant to the first use question will be the same: (1) a party to U.S. civil litigation seeks information located outside the United States; (2) an opposing foreign litigant objects to the breadth and the intrusiveness of U.S. discovery techniques for obtaining that information; (3) the country where the evidence is located considers its sovereignty violated by the use of standard U.S. discovery methods to obtain information

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[68] Statistics provided by Dr. Christof Boehmer, Federal Ministry of Justice, Bonn, Federal Republic of Germany.

[69] *Mitsubishi v. Soler*, 105 S. Ct. at 3360.

[70] Convention History, *supra* note 10, at 55, 83.

located within its territory; [71] and (4) Hague Convention procedures are likely to yield information useful to the party seeking the foreign discovery. Accordingly, this situation is one like those described above [72] where the principle of comity generates a rule—here the rule of exhaustion, or first use, of Hague Evidence Convention procedures for extraterritorial discovery in civil cases.

Moreover, there are powerful practical considerations supporting the announcement of a first-use rule. Experience has shown that many trial courts give short shrift to legitimate foreign interests when faced with requests to use Hague Evidence Convention procedures. Such courts not surprisingly turn to the more familiar procedures established by their own local rules.[73] Moreover, erroneous discovery decisions by U.S. trial courts cannot adequately be corrected on a case-by-case basis by the appellate courts, because of limitations on appellate review of interlocutory discovery decisions.[74]

Under the circumstances, any "futility" exception to the first use rule must be narrowly circumscribed so as not to undermine the rule itself. This Court should require the litigant seeking extraterritorial discovery to

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[71] Some countries have enacted blocking statutes; others such as Germany have made their objections clear through diplomatic notes and amicus briefs in U.S. litigation. *See supra*, notes 7 and 8. This Court should accord equal respect to both methods. A ruling that gives special deference to countries that have enacted blocking statutes is likely to heighten the level of international confrontation by inducing additional countries to enact such statutes.

[72] See *supra*, notes 38-43 and accompanying text.

[73] *See, e.g., Messerschmitt*, 757 F.2d at 731; *Murphy*, 101 F.R.D. at 363; *Lasky v. Continental Prods. Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983). *See generally*, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad*, 37 U. Miami L. Rev. 733, 741-42 (1983); Maier, *supra* note 65, at 317.

[74] *See Kerr v. United States*, 426 U.S. 394, 402 (1976); *see also Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to review district court decision involving extraterritorial discovery).

make a strong showing to justify bypassing the Convention's procedures. For example, it should not be enough for the litigant to show that use of the Convention would provide information in a different form than would U.S. discovery methods (*e.g.*, testimony or answers to interrogatories or requests for admissions rather than production of documents). The focus should at all times remain squarely on whether any useful information about relevant issues is available through the Convention. It will only be in rare cases that no useful information whatever can be obtained through the first use of the Convention.

C. If Convention Procedures Do Not Produce Satisfactory Discovery, Then the U.S. Court Should Order Direct Discovery under Federal or State Rules Only Where There Is No Alternative If Justice Is To Be Done Between the Parties.

Once the receiving state's court has responded to a Hague Evidence Convention request, the party seeking discovery may well be satisfied with the information provided. If, however, the party seeks further discovery not available through Convention procedures, the U.S. court will then decide, in light of the principle of international comity, whether to enforce U.S.-style discovery by issuing discovery orders to produce information located abroad. At this stage, unlike the initial stage, no general rule can be laid down in advance. The court must apply a comity analysis to the precise facts and circumstances of the individual case.

As at the first stage and for the same reasons, foreign sovereign interests—now clearly articulated by the foreign court or central authority—will weigh strongly against ordering discovery under U.S. procedures. The U.S. interests in doing so, on the other hand, may be stronger than at the initial stage, because Convention procedures have not provided fully satisfactory discovery. Even so, these U.S. interests will frequently be insufficient to justify direct discovery orders. For example, the information sought may be available from sources in the United States, or it may not be "necessary to the action . . . and directly relevant and material." [75] Alternatively, it may be possible to vindicate the interest of the party seeking extraterritorial discovery merely by drawing the logical adverse inference from the foreign party's failure to produce specific information on a contested issue. The U.S. court should not compel production of information from the territory of a foreign nation objecting to such production unless the U.S. litigant demonstrates that there is no alternative if justice is to be done between the parties. Even then, the court should narrowly tailor its discovery order to avoid unnecessary intrusion on foreign interests.[76]

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[75] *See Restatement (Revised) of Foreign Relations Law of the United States* § 437, comment a (Tent. Draft No. 7, April 10, 1986).

[76] *See* Oxman, *supra* note 73, at 784 *et seq.*

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:
DIETER G. LANGE
ANDREW N. VOLLMER
THOMAS JESTAEDT
WILMER, CUTLER & PICKERING
4 Carlton Gardens
London, SW1Y 5AA
England

ULRICH STÜRMER
Gereonshof 14-16
5000 Cologne 1
West Germany

GERHARD NAGORNY
Riethorst 2
D-3000 Hannover 51
West Germany

KURT E. BIEDERMANN
KROLL, TRACT, HARNETT,
POMERANTZ & CAMERON
500 Fifth Avenue
New York, New York 10110

JAMES S. CAMPBELL
Counsel of Record
DAVID WESTIN
GARY BORN
CAROL F. LEE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH

NEAL D. HOBSON
MILLING, BENSON, WOODWARD,
HILLYER, PIERSON & MILLER
1100 Whitney Building
New Orleans, LA 70130
Attorneys for Anschuetz & Co. GmbH

KEVIN H. GOOD, P.C.
STRASBURGER & PRICE
4300 Interfirst Plaza
901 Main Street
Dallas, Texas 75202
Attorneys for Messerschmitt-Boelkow-Blohm GmbH

APPENDIX

APPENDIX

Karl M. Meessen [1] March 31, 1986

THE ANSCHÜTZ AND MESSERSCHMITT OPINIONS THE INTERNATIONAL LAW ON TAKING EVIDENCE FROM, NOT IN, A FOREIGN STATE:

OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.[2]

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[1] Dr. iur.; Professor of Public Law, International Law and European Law at the University of Augsburg, Federal Republic of Germany; currently Visiting Professor of International Law at the Law School of the University of Chicago; Special Consultant on International Economic Law to the American Law Institute regarding the Restatement of the Foreign Relations Law of the United States (Revised).

[2] *In re Anschuetz & Co. GmbH*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985). Upon petitions for certiorari, both cases are presently pending before the United States Supreme Court. The following opinion has been prepared in view of those proceedings at the request of Gerling-Konzern Allgemeine Versicherungs-Aktiengesellschaft, Cologne, Federal Republic of Germany. Gerling is the insurer of product liability risks to both petitioners.

TABLE OF CONTENTS

I. Summary

As indicated by diplomatic interventions of the German, British and French governments, the Anschütz and Messerschmitt cases raise serious issues of international law. From the point of view of international law, the opinions below can in fact not be upheld. Correction may result from applying U.S. procedural law in conformity with international law as the law of the land, or preferably, from reconsidering the application of comity under U.S. law in a manner that is in accordance with the underlying rule of international law. If, for whatever reason, conformity with international law is not reached, the U.S. would be liable towards Germany under the international law of responsibility.

The relevant rule of international law does not directly derive from the Hague Evidence Convention which is inconclusive as to its relation to such domestic procedures of taking evidence as are under review here. But the Convention or, more precisely, the availability of Convention procedures is of indirect importance under the controlling rule of customary international law which is: In exercising its procedural jurisdiction, a state has to accommodate conflicting foreign state interests, especially by adopting compromise solutions designed to reconcile domestic and foreign interests.

The foregoing rule reflects the common denominator of views, held in practice and legal doctrine, on the broader problem of extraterritorial jurisdiction. Causing the transfer of evidence from a foreign state to be produced before domestic courts is an instance of exercising extraterritorial jurisdiction.

To apply that rule of customary international law, an assessment of German and U.S. interests has to be made not unlike applying comity principles under U.S. law. In doing so, two factors which, it is submitted, the court below failed to understand have to be taken into consideration:

(1) Germany's interest in the protection of its judicial sovereignty would be seriously affected if evidence were removed from German territory as a result of U.S. court orders to that effect. Parties and witnesses residing in Germany are, under the German constitution, entitled to expect the taking of evidence to be operated by German courts.

(2) The U.S. has an interest in granting plaintiffs before U.S. courts access to the necessary evidence even as regards foreign defendants controlling evidence located abroad. But that interest may well be served by first taking recourse to Convention procedures which, as German-U.S. practice of legal assistance has demonstrated, offer access to the contents of documents even at the pretrial stage so that the production of documents themselves could be ordered for trial.

In reconciling those interests, the above rule of customary international law requires plaintiffs to proceed as follows: In the present first phase of litigation, plaintiffs have to use the channels of the Convention. If, contrary to experience, plaintiffs still need further evidence to prepare trial, there is time for U.S. courts, in a second phase, to come back to the question of ordering, at the request of plaintiffs, the transfer of evidence from Germany to the U.S.

II. The International Law Issues in Anschütz and Messerschmitt

In both Anschütz and Messerschmitt, product liability suits have been brought against the German manufacturers of boat steering devices (Anschütz) and of helicopters (Messerschmitt). Defects of an Anschütz steering device allegedly contributed to the collision of a Spanish owned vessel with a ferry landing at the mouth of the Mississippi River, causing damage to the landing and several other boats. Defects of a Messerschmitt helicopter allegedly contributed to a crash, near McKinney, Texas, in April 1982, causing the death of three occupants.

The district courts, finding to have personal juristion over the respective defendant, ordered the production of documents located in Germany and the deposition of some of each defendant's employees also located in Germany. According to the Anschütz opinion, the evidence is to be taken in the United States "[i]f Anschütz is not voluntarily forthcoming in Germany." [3] In Messerschmitt, that condition already formed part of the opinion of the district court which was confirmed by the court of appeals.[4]

Both cases are not on taking evidence in a foreign state. They are on taking evidence from a foreign state. The witnesses and the documents would have to be transferred from Germany to the United States for the purposes of taking evidence in the United States. If the court orders were to be confirmed, the German defendants would, in case of non-compliance, face sanctions which could be enforced within U.S. territory as long as the defendants own property there. The enforceability of the U.S. orders is not open to doubt. The question, however, is whether ordering the transfer of the evidence is in conformity with international law.

International law comes in as treaty law. The Federal Republic of Germany and the United States of America are both parties to the Convention on Taking Evidence Abroad in Civil or Commercial Matters which was signed at the Hague on March 18, 1970 and which is, therefore, often referred to as the Hague Evidence Convention. The court of appeals denied the Convention to have an impact on the application of the U.S. Federal Rules of Civil Procedure. That conclusion will be reexamined under the aspect of treaty law in Section III of this opinion.

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[3] Anschütz, at 615.

[4] Messerschmitt, at 730.

Customary international law comes in as well. Causing conduct in Germany, that is causing the transfer of evidence that would in Germany be exclusively for German courts to order, may have affected Germany's judicial sovereignty. The court of appeals, applying comity principles of U.S. law, did not find an infringement of German sovereignty as long as the evidence was not actually taken in Germany without German consent. Whether the mere absence of physical intrusion really removes the possibility of any violation of customary international law protecting German sovereignty, will be discussed in Section IV.

A violation of customary international law, as it will indeed be established, may be avoided by reconsidering the application of comity principles of U.S. law. A short observation to that effect in Section V will conclude the opinion.

It may be noted at this point that the violation of the customary international law rule protecting German sovereignty could only have been waived by Germany itself and not by any of its nationals.[5] Far from waiving any right, the German government intervened as amicus curiae in Anschütz, which came to be considered the lead case, and voiced protests on the diplomatic level. The international law issue has not become moot.

III. Treaty Law: The Hague Evidence Convention

The Hague Evidence Convention entered into force for the Federal Republic of Germany on June 26, 1979.[6]

[5] For a similar view cf. Pierburg GmbH and Co., KG v. Superior Court of Los Angeles County, 186 Cal. Rptr. 876, at 882 (1982); Coopers Industries Inc. v. British Aerospace Inc., No. 83 Civil 6366 (DNE) (S.D.N.Y. 1984).

[6] Bekanntmachung über das Inkrafttreten des Haager Übereinkommens über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen vom 21. Juni 1979, Bundesgesetzblatt 1979, Teil II, 780.

As of that date, the Convention is binding upon both states involved in the present dispute since the U.S. had already become a party to the Convention as of October 7, 1972.[7] In the following, the availability of procedures of taking evidence in Germany under the Hague Evidence Convention (Convention procedures) will be discussed at first (Subsection 1). Afterwards the discussion will turn to the question of whether the availability of Convention procedures is in any way limiting access to U.S. procedures of taking the evidence from Germany (Subsection 2). The analysis will be conducted as a matter of treaty interpretation only. The impact which the availability of Convention procedures may have under customary international law or under U.S. law will be examined in Section IV and V respectively.

1. Availability of Convention Procedures

In Anschütz, the court of appeals stated: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."[8] This is correct but beside the point: It is correct that the Hague Evidence Convention provides for various procedures of taking evidence in a foreign state, while no procedures of taking evidence from a foreign state are provided for under the Convention. Yet the question is whether Convention procedures, if available, should be used instead of taking recourse to U.S. procedures to transfer to the U.S. witnesses residing in Germany and documents located in Germany. The whole argument depends on whether Convention procedures are indeed available in the instant cases. That question will, therefore, have to be examined before any conclusions could be drawn regarding the impact on access to U.S. procedures. Availability of convention procedures is, in

[7] 23 U.S.T. 2555, T.I.A.S. No. 7444.

[8] Anschütz, at 615.

this context, understood to signify first that the convention is applicable at all and second that its procedures are suited to produce the evidence sought for in the particular case.

The applicability of the Convention follows from just one requirement: The presence of a civil or commercial matter. The instant claims for damages, based on product liability, qualify as such civil or commercial matter. In that respect, the court of appeals rightly expressed no doubt in either case.

The passage from Anschütz quoted above and some accompanying language could be understood to deny the applicability of the Convention whenever the domestic court finds personal jurisdiction over a party-witness. The Convention, however, does not make the absence of personal jurisdiction a requirement of its applicability. From the U.S. law point of view, Bernard H. Oxman argued: "The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed enquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court." [9] From the point of view of international law, as may be added, limiting the applicability of the Convention to cases in which municipal law does not extend in personam jurisdiction to the respective witness would hardly make sense. There may well be situations in which evidence located abroad could only be reached through the channels of the Convention even though personal jurisdiction may be present, e.g. when a sanction could not be enforced for lack of property located within the state attempting to take the evidence.

[9] Bernhard H. Oxman, The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 UnivMiamiLRev 733, at 740 (1983).

In Anschütz and Messerschmitt, the Convention is brought into play by the foreign location of the information on the products in question. The practical availability of such procedures, however, will have to be assessed in some detail, first regarding the depositions demanded by plaintiffs (Subsection 1 a) and then regarding the orders for the production of documents (Subsection 1 b).

a) The Taking of Depositions

In both cases, plaintiffs are requesting the deposition of expert witnesses belonging to the personnel of the defendant manufacturer. Could such depositions be handled through the channels of the Convention? That question does not relate to the procedures of taking of evidence "without compulsion" by diplomatic officers under Chapter II of the Convention.[10] In view of the objections raised by Anschütz and Messerschmitt, it only relates to legal assistance under Chapter I of the Convention. In proceeding under Chapter I, the following points have to be considered:

Letters of request may under Article 1 (2) "not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated." That requirement seems sufficiently broad to cover even requests for discovery at the pretrial stage if the discovery is at all directed towards the objectives of the pending action. It may be assumed that the district courts ordering the discovery made sure of that requirement to have been met.

Article 3 of the Convention sets forth a number of formal requirements for specification of the request. Un-

[10] In addition to the Convention, see German note to U.S. Embassy in Bonn of October 17, 1979, and U.S. note to German Foreign Office of February 1, 1980, both published in: Bruno A. Ristau, International Judicial Assistance (Civil and Commercial), vol. II, at C I-78 et seq.

der that provision, U.S. judges may find themselves in a situation not familiar to them when having to specify the necessary evidence at a very early stage of the proceedings. Such scrutiny appears to be the price the U.S. had to pay for having its system of discovery included into a convention only dealing with the taking of evidence in its more narrow meaning. To provide that specification does not place an undue burden on U.S. courts. In practice, pretrial conferences might serve as an appropriate institutional framework.

Under Article 9 (1) of the Convention, Germany is, when executing a letter of request, entitled to apply its own procedural law regarding the form of taking the evidence. But at the request of the U.S., Germany would have to adapt its procedures to U.S. procedures unless entirely impractical or prohibited by German law (Article 9 (2)). Thus a German court would take verbatim records instead of having the judge summarize the statement made by the witness as is usual practice in Germany.

To be sure, Article 11 (1)(a) retains to witnesses deposed in Germany all the privileges of German law. In the instant cases, it is difficult to predict whether any of the grounds for refusing to testify as listed in Sections 383 and 384 of the German Code on Civil Procedure could become relevant. But, even if, for instance, an employee should under those provisions refuse to answer a specific question arguing that the answer might be evidence in support of claims against the witness himself, such refusal would be a significant fact allowing the U.S. court to draw its own conclusions. The protection of business secrets under Section 384 no. 3 of the German Code on Civil Procedure is usually construed narrowly. Whether it could bar disclosure of information regarding products manufactured quite some time ago, as was the case in Anschütz and in Messerschmitt, is doubtful. Prod-

uct liability suits before German Courts are nothing out of the ordinary.

Finally, Article 12 (1) (b) authorizes Germany, being the requested state in the instant cases, to refuse to execute an eventual letter of request, if it "considers that its sovereignty or security would be prejudiced thereby." Neither product seems to be particularly sophisticated as to qualify as a matter of German security, and Germany could surely not invoke its "judicial" sovereignty when asked to execute a letter of request under a binding international treaty. Nor did the German government refer to any other element of its sovereignty as being affected.

To sum up, a request for the taking of depositions in Germany has a fair chance of being executed once the requesting courts make sure that questions to witnesses be specified in an adequate manner. Such prognosis seems confirmed by the astonishing extent to which Convention procedures have been used in German-U.S. practice shortly upon the Convention's entry into force: According to information supplied by the German Government in its amicus brief, 151 requests from U.S. courts were received in Germany during the period of 1979 to 1984. 131 of these requests were accepted and executed. Most of the 20 requests which were rejected either did not sufficiently identify the evidence to be taken or were for production of documents at the pretrial stage.[11]

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[11] Anschütz and Co. GmbH v. Mississippi River Bridge Authority, et al., No. 85-98, Supreme Court of the United States, Petition for writ of certiorari, Brief for the Federal Republic of Germany as amicus curiae of August 1, 1985; a scholarly investigation, privately undertaken for the same period, revealed a lower total, but about the same proportion of requests granted in relation to requests denied: 63 to 12 (Harald Koch, Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozessrecht, Ergebnisse einer Umfrage zu dem Haager Zustellungs- und Beweisübereinkommen, 5 Praxis des Internationalen Privat- und Verfahrensrechts, 245, at 247 (1985)).

b) The Production of Documents

In both cases, orders of taking evidence by way of production of documents were approved by the court of appeals. Could those orders be channeled through the Convention procedures as well?

Among the 17 contracting states (by the end of 1984), Germany is one of the 13 states to have made a declaration under Article 23 of the Convention to the effect that execution of letters of requests "issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries" is severely restricted or excluded altogether. Germany, indeed, unmistakingly declared: "Requests for judicial assistance having as their object a procedure as defined in Article 23 of the Convention will not be executed." [12] In addition, the Federal Minister of Justice was authorized to adopt, with the consent of the Federal Council, a representation of Länder governments serving as a second chamber of parliament, a regulation providing for the execution of such requests to the extent that "they do not violate basic principles of German procedural law, and . . . that the legal interests of the individual involved are taken into account." [13] Such regulation not yet having been adopted, requests for the production of documents in Anschütz and Messerschmitt would not be executed at the present pretrial stage of the proceedings.

The practical impact of the foregoing conclusion, however, has to be seen in the light of two alternatives to requests for the production of documents at the pretrial stage: Such requests could be substituted by depositions to be taken at the present pretrial stage, or the production of documents could be requested later at the trial stage of the proceedings. Both alternatives merit further exploration.

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[12] Bundesgesetzblatt 1977 Teil II, 3105, as translated by Bruno A. Ristau (note 10), at CI-84.

[13] Id., note 12.

In German court practice, it is common to hear witnesses as to the contents of special documents they have access to. For most practical purposes, therefore, a request for production of documents may be replaced by a request for deposing a witness on questions such as the minutes of meetings, the contents of instructions or even on possible defects of a product as established by blueprints and their alterations. In formulating the requests and in using the evidence, U.S. courts are asked for considerable adaptation to Convention procedures. But "accommodation of the different methods" of taking evidence is what the Preamble of the Hague Evidence Convention says international legal assistance is about. Such adaptation emanates from the legal obligation to implement the Convention and therefore has to be included into any assessment of what constitutes "best evidence" from the point of view of U.S. law.

Above all, substituting documentary evidence by depositions at the pretrial stage has stood the test of German-U.S. practice. The Permanent Bureau to the Hague Convention on Private International Law stated in its report on the operation of the Convention: "The decision of the Oberlandesgericht (Higher Regional Court) Munich of 27 November 1980 . . . illustrates that even where the requested state, as in the case of the Federal Republic of Germany, has made an absolute reservation under Article 23, it may be possible to obtain information on documents which themselves could not be surrendered or produced, by way of the compulsory examination of third persons as witnesses concerning the contents of those documents." [14] In that case, the Bavarian Minister of Justice decided, on the one hand, to decline a request for

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[14] Hague Conference on Private International Law, Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Prepared by the Permanent Bureau, July 1985.

the production of documents and, on the other hand, to grant a request for depositions. The decision of the Minister of Justice was confirmed on both counts by the Oberlandesgericht.[15] Counsel for the party seeking the evidence later reported "that the depositions could be taken only with respect to the material listed in the document request, even though the document request had been denied" and summarized his report by stating: "All things considered, the German depositions in the end worked out rather well." [16]

Requests for the production of documents at the trial stage will, unlike those at the pretrial stage, be entertained by Germany according to the general conditions set forth above regarding the deposition of witnesses. As a result, documents would have to be sufficiently specified to conform with Article 3 of the Convention. Yet a careful handling of depositions at the pretrial stage would enable one to be reasonably specific. No further adjustment of U.S. trial procedures seems required. Plaintiff would, as a result of pretrial depositions, have sufficient knowledge regarding the contents of the documents as to be able to decide on having them produced during trial. Such production of documents could, under Article 23 of the Convention and under the respective German declaration, be ordered well ahead of trial as long as such order would not have to be implemented before trial actually begins.

While it is true, therefore, that Germany would not execute a request for production of documents at the present stage, the unavailability of that particular means of evidence is offset by the availability of two other Con-

[15] OLG München, Decisions of October 31, 1980 and of November 27, 1980, 9 VA 3/80 and 4/80, 20 International Legal Materials 1025, 1049 (1981).

[16] Charles Platto, Taking Evidence Abroad for Use in Civil Cases in the United States: A Practical Guide, 16 International Lawyer 575, at 584-585 (1982).

vention procedures: extending depositions to the contents of the documents and postponing the production of documents to the trial stage. The Superior Court of New Jersey was right when it observed in Vincent v. Motobecane: "Moreover, if Vincent (scil. when using Convention procedures) is denied access to the actual documents themselves, it may still be able, even without them, to obtain the technical and commercial information it seeks." [17]

2. Inconclusiveness of the Convention as to its Relation to Domestic Procedures.

Having established that Convention procedures are indeed available for the purpose of taking evidence in the two instant cases, it may now be asked how the Convention rules on its relation to such domestic procedures as presently under review. Is the Convention exclusively applicable whenever its procedures are available? Does the Convention offer an option in addition to the availability of domestic procedures? Or does the Convention constitute the primary way of taking the evidence necessary in a particular lawsuit?

The Convention is on "the taking of evidence abroad." Its text does not seem to side with any of the above, nor any additional, alternatives. Under Article 27 of the Convention, contracting states are not prevented from "permitting, by internal law or practice, methods of taking evidence other than th[illegible]e provided for in this Convention." That clause should not be misread to relate to the internal law or practice of the requesting state. It merely states the obvious: The requested state may be more generous than provided for under the Convention and is free to grant assistance under Chapter I of the Convention or to permit the taking of evidence by diplomatic officers under Chapter II of the Convention in

[17] James Vincent et al. v. Ateliers de la Motobecane S.A., 475 A.2d 686, at 690 (N.J.Supp.A.D. 1984).

greater breadth than the contracting parties were prepared to commit themselves to by treaty obligation.[18]

The parallel treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, states in its Article 1(1): "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." [19] In Anschütz, the court of appeals interpreted that clause to provide for the exclusiveness of the Service Convention in contrast to the Evidence Convention.[20] That is correct as regards serving documents abroad, but not as regards bringing about the same effect by domestic service, e.g. by publishing an announcement in the official journal to effectuate service against persons residing abroad. The German government, when submitting both Conventions to the Federal Diet, for parliamentary consent, clearly stated that such other methods of bringing service to persons living abroad had not been ruled out.[21] To the question under review here, it is of no significance, therefore, that the Evidence Convention does not contain a provision similar to Article 1(1) of the Service Convention.

The text of the Hague Evidence Convention not being just ambiguous but silent, there is no room for using imaginative techniques of interpretation. The Convention does not answer any of the above questions. It remains

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[18] For the same view cf. e.g. Philadelphia Gear Corp. v. American Pfauter Corp. et al., 100 F.R.D. 58 (E.D. Pa. 1983); Comment, the Hague Convention on the Taking of Evidence Abroad In Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad, 132 UPaLRev 1461, at 1476 (1984).

[19] 20 U.S.T. 361, T.I.A.S. No. 6638, Bundesgesetzblatt 1977 Teil II 1453.

[20] Anschütz, at 615.

[21] Bundesregierung, Denkschrift zu den Übereinkommen, Bundestags-Drucksache 8/217, 38, at 40-41 (1977).

inconclusive. Its relation to domestic procedures will have to be derived from a rule of law separate from the Convention itself. The respective rule of customary international law will be for the next section of this opinion to establish.

IV. Customary International Law: The Protection of State Sovereignty.

Amicus briefs and diplomatic notes accompanying litigation before municipal courts signalize issues of extraterritoriality affecting state sovereignty. In fact, it was such reactions of foreign governments that gave rise to a give and take between the states which developed patterns of statute practice eventually to grow into rules of customary international law protecting state sovereignty.

In Anschütz, the court of appeals was by no means unsensitive to the international dimension of the case. It invited the German government and the U.S. Department of Justice to state their views, and, in its opinion, it subscribed to the need of avoiding "any infringement upon German sovereignty." [22] The court, however, could not find an infringement unless the evidence were taken in Germany. Similarly, in Messerschmitt, the court first acknowledged Germany's legitimate concern, but was then satisfied to find the balance of comity considerations to be in favor of the U.S. since the order for the production of documents would not require "any governmental action in Germany," and as to the expert witnesses, comity principles were, in the court's view, not implicated at all.[23]

In the following, the discussion will focus first on establishing the rule of customary international law on the protection of state sovereignty when evidence is taken from abroad (Subsection 1). Thereafter that rule will be applied to the facts of the Anschütz and Messerschmitt cases (Subsection 2).

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[22] Anschütz, at 615.

[23] Messerschmitt, at 732-33.

1. Accommodating Conflicting Interests of Foreign States.

Taking evidence from a foreign state, rather than in a foreign state, is just one instance of the general problem of extraterritorial jurisdiction: Respecting the physical integrity of foreign territory, but causing conduct in foreign territory by way of domestic measures. In the case of taking evidence it is the domestic courts that order such foreign conduct, to wit, making a witness travel to domestic territory or collect documents and take them to domestic territory for production there.

The international law on extraterritorial jurisdiction as it developed in the fields of antitrust law, security exchange control law, export control law, etc. could not precisely be called well settled. Some basic tenets, however, are no longer controversial:

(1) Causing extraterritorial effects is not generally prohibited. Matters for regulation are transterritorial in nature and could not be split up and apportioned to the exclusive jurisdiction of the respective states.

(2) Causing extraterritorial effects is not generally permitted either. A free-for-all of extraterritorial regulation would, by establishing conflicting demands, disorientate decision-making of individuals and create general chaos.

(3) Exercising extraterritorial jurisdiction is in conformity with international law if the foreign state where the extraterritorial effects are to occur is, neither generally nor in the particular case known to be objecting.

What is the law when the foreign state, as in the instant cases, does raise objections? The general principle of sovereign equality demands, and the overall record of state practice confirms: Conflicting interests of foreign states have to be accommodated, especially by

adopting compromise solutions; if no compromise solution can be found, states are not permitted to take such measures as would cause greater harm to foreign interests than do good for domestic interests.

To what extent a state is obligated to defer to greater interests of foreign states may still be a matter of controversy. The first draft of the Restatement of Foreign Relations Law (Revised) was very vague in that respect when it stated in § 403 (3): ". . . Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2)."[24] Yet the latest draft, to be submitted for final approval at the Institute's Annual Meeting in May 1986, contains the following new text of § 403 (3): "(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2), and should defer to the other state if that state's interest is clearly greater."[25] In the opinion of this writer, the last part of the provision would have to read: ". . . each state has an obligation . . . to defer to the other state if that state's interest is greater."[26] There is, however, no need to elaborate on the evidence for that thesis here since the first part of the above rule, regard-

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[24] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 2 (1981).

[25] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Final Draft, to be published shortly.

[26] Cf. Karl M. Meessen, Antitrust Jurisdiction Under Customary International Law, 78 AmJInt'lL 783 (1984); idem, Extraterritoriality of Export Control: A German Lawyer's View of the Pipeline Case, 27 German Yearbook of International Law 97 (1984).

ing the accommodation of interests of foreign states, suffices to deal with the instant cases at this stage as will be shown in Subsection 2 of this Section.

The international law obligation to accommodate interests of foreign states has, probably for the first time, been formulated in § 40 of the Second Restatement of Foreign Relations Law in 1965. There, in cases of concurrent jurisdiction of two or more states, each state was stated to be "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states." [27] In the meantime, U.S. courts, partly relying on U.S. law principles of comity, have brought ample proof of both the existence and the practical operability of the rule.[28] The final decision in Timberlane of 1984 [29] confirmed the rule, and the 1984 decision of the Court of Appeals for the District of Columbia Circuit in Laker [30] is not to the contrary since the limitations to the application of comity mentioned there leave unaffected the obligation to accommodate such foreign interests as are not "fundamentally prejudicial to those of the domestic forum." [31]

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[27] The American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

[28] Cf. e.g. Restatement in the Courts, Cumulative Annual Pocket Part For Use In 1985-1986, Reporting All Cases Through June 1984 that cite Restatement of the Law, Second, Foreign Relations Law of the United States, at 61 et seq. (1985).

[29] Timberlane Lumber Co., et al. v. Bank of America N.T. & S.A. et al., 749 F.2d 1378 (9th Cir. 1984), cert. denied, 105 S.Ct. 3514 (1985).

[30] Laker Airways Limited v. Sabena, et al., 731 F.2d 909 (D.C. Cir. 1984).

[31] Laker v. Sabena (note 30), at 937; for a general evaluation of the Laker opinion cf. Meessen, Antitrust Jurisdiction (note 26), at 786 et seq., 801 et seq.

In the Restatement of Foreign Relations Law (Revised), the accommodation of foreign interests has been included into the broader principle of "reasonableness" which states as an international law obligation to evaluate i.a. "The likelihood of conflict with regulation by other states." [32] Even the Court of Appeals for the Fifth Circuit, as may be gathered from its reference to comity,[33] does not seem to be objecting to the existence of an obligation to accommodate foreign state interests. But, in cases on the taking of evidence "from, not in, a foreign state," the court seemed determined never to find any need for such accommodation since effects on foreign sovereignty were practically ignored. It is this application of the rule that was inadequate as will be demonstrated in the following subsection.

2. Applying the Rule on the Accommodation of Foreign Interests.

The international law rule again is: In exercising jurisdiction, a state has to accommodate conflicting interests of foreign states, especially by adopting compromise solutions.

To the American reader, applying that rule will very much look like applying comity principles of U.S. law. Both rules are in fact interrelated: The state practice underlying the international law rule substantially draws from U.S. case law developed under comity considerations, and that case law may, as will be shown in the next Section, continue to be applied if kept short of an infringement of international law.

To apply the international law rule, it is suggested to start by assessing foreign, i.e. German, interests (Subsection 2 a), then to proceed to an assessment of U.S. interests (Subsection 2 b), and finally to discuss an ac-

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[32] The American Law Institute (note 28), § 403 (1) and (2) (h).

[33] See above notes 22 and 23.

commodation of the interests of the two states involved (Subsection 2 c).

a) German Interests.

As has been mentioned at various instances, the German government intervened in Anschütz and lodged a formal diplomatic note on November 29, 1985. That attitude towards taking of evidence may be traced back to the German answer to a questionnaire distributed in 1968 to prepare the drafting of the Hague Evidence Convention: "Furthermore the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or any other agent legally authorized." [34] The U.S. delegation that had taken part in the drafting of the Convention clearly understood the point made by the German government and other governments when it used the following formulation in its report: "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities." [35] The term "judicial sovereignty" precisely designates what the German government is concerned about. Those concerns will, however, have to be explained in greater detail.

In Messerschmitt, the court of appeals remarked that "American discovery procedures may indeed inconven-

[34] Conference de la Haye de droit international prive, Actes et documents de la onzieme session, 7 au 26 octobre 1968, tome IV, Obtention des preuves a l'etranger, at 22 (1970)—author's translation from the French original.

[35] U.S. Delegation to the 11th session of the Hague Conference on Private International Law, Report of April 1969, 8 International Legal Materials 785, at 806 (1969).

ience the German civilian judicial system." [36] To many Germans who are involved as parties or witnesses in U.S. discovery proceedings, the situation is not just inconvenient, but frightening. The frightening aspect is not that they have to reveal the truth for the purposes of a specific claim brought before the court. They would have to do so under Convention procedures as well. The frightening aspect rather is that many matters would have to be revealed without ever being of any use for the ongoing litigation. German firms would not understand if their business operations in Germany, not just those in the U.S., were hampered for a considerable period of time by having to answer lengthy interrogatories, to disclose hundreds of files of documents and to give leave of absence to employees for depositions in the United States. As regards the production of documents, German defendants could not, unlike U.S. defendants, ease matters by allowing inspection to take place in Germany, since this would mean exercise of U.S. judicial authority within a foreign state, which is, if objected to by that state, clearly prohibited. In the case of a foreign witness, therefore, there is no way to control into whose hands the information disclosed might be passed on. Competitors might obtain valuable information. German witnesses are also concerned about the need to retain U.S. counsel for the purpose of preparing in Germany the taking of evidence in the United States and for the purpose of responding by requests for broad discovery against the plaintiff. German firms and individuals feel professional privileges to be undercut and business secrets to be jeopardized. The bargaining aspects of some of those campaigns for discovery and U.S. practice of paying contingency fees to lawyers cause additional resentment.

The German attitude should not be misinterpreted as in any way criticizing the U.S. judicial system as such.

[36] Messerschmitt, at 732.

It only results from unfortunate experiences caused by the interplay of the two systems whenever U.S. style discovery became effective in Germany. The German position has to be seen in the context of German procedures on taking evidence and of their constitutional background.

Court control of civil litigation in Germany has aptly been described as "conference method." [37] As regards the taking of evidence, three different phases could, perhaps, be distinguished although it would depend on the complexity of the case and to what extent these phases could overlap or coincide: [38]

(1) On the basis of two comprehensive pleadings, the one containing the complaint and the other one the defense, the judge will try to find out what the parties are aiming at and on what grounds, in his view, the claim and the defense could possibly be based. He will pay special

[37] Benjamin Kaplan/Arthur T. von Mehren/Rudolf Schaefer, Phases of German Civil Procedure, 71 HarvLRev 1193, 1443, at 1471 (1958).

[38] For a comprehensive English language description, the author's preference for the German system left aside, cf. John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985); cf. also Rolf Bender/Christoph Strecker, Access to Justice in the Federal Republic of Germany, in: Mauro Cappelletti/Bryant Garth (eds.), Access to Justice, Volume I, Book II, at 551 et seq. (1978); Hartwig von Westerholt/Peter Lantz, Litigation in Civil Courts, in Bernd Rüster (ed.), Business Transactions in Germany, Volume I, Chapter 5, at 5-34 et seq (1983); Donald R. Shemansky, Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 International Lawyer 465 (1983); Peter Gottwald, Simplified Civil Procedure in West Germany, 31 AmJCompL 687 (1983); Axel Heck, Transnational Litigation: Federal Republic of Germany and the E.E.C., 18 International Lawyer 793 (1984); Hans Schima/Hans Hoyer, Ordinary Proceedings in First Instance: Central European Countries, in: International Encyclopedia of Comparative Law, Volume XVI, Chapter 6, p. 6-130 (1984).

attention to isolating the factual allegations necessary to support the various legal points and to finding out which of those facts have been admitted and which are still being contested by the other party and, therefore, have to be established through the taking of evidence. Even if a party is represented by counsel, the judge might find it necessary to suggest to supplement factual allegations and/or requests for taking evidence.

(2) The judge will then hear the parties, perhaps urge a settlement and decide about the taking of evidence as to those of the factual allegations that are both relevant and contested. The taking of evidence may be ordered by a formal ruling, by an informal letter to both parties or by a more or less casual observation made during the hearing. To some extent, judges have the authority to order the taking of evidence not requested by either party in order to get a more accurate account of the relevant facts.

(3) The actual taking of the evidence is carried out before court and under the direction of the judge. In particular, it will be the judge who extensively examines the witness and, only afterwards, allows for additional questions by counsel of each party. The judge then formulates a summarizing report of what the witness has said, always focusing on the relevant facts and those circumstances which throw light on the credibility of the witness. During the taking of evidence the judge makes sure that privileges of parties and third persons receive adequate protection even when no objections were raised to that effect.

Aiming at a rapid and correct conclusion of litigation is an objective Germany shares with the U.S. The

prominent role of the judge in controlling the taking of evidence, however, marks a notable contrast, not to other civil law countries, but to the U.S. Overcoming the laissez-faire liberalism of the 19th century, Germany gradually introduced welfare state notions into private litigation. The welfare aspect is that neither the parties nor third persons should suffer from poor presentation of their case often due to inadequate counseling which in turn may, but need not, result from a lack of financial resources. The judge, as both impartial and active director of the proceedings, has to redress any imbalances of advocatorial skills, and he has to take care that the final judgment be as close to objective truth as possible.[39]

Today, that attitude is firmly established as a matter of constitutional law. The principle of welfare state is a binding principle of German constitutional law as is, of course, the equal protection clause.[40] Both provisions have repeatedly been applied in constitutional reviews of decisions of last instance in civil litigation. Thus the Federal Constitutional Court vacated a judgment of an ordinary court on the ground that the court should have exempted the party from a formally binding term.[41] It also vacated a ruling on a compulsory auction, pointing out that the judge should have advised the applicant to

[39] Wolfram Henckel, Vom Gerechtigkeitswert verfahrensrechtlicher Normen, passim (1966); Karl August Bettermann, Verfassungsrechtliche Grundlagen und Grundsätze des Prozesses, 94 Juristische Blätter, 57, at 63 (1972); Rudolf Wassermann, Der soziale Zivilprozess, Aufklärung im Zivilprozess, at 38 et seq. (1982); for a short English-language reference to the concept see Peter Gottwald (note 38), Rolf Bender/Christoph Strecker (note 38) and especially Langbein (note 38), at 831 and 843.

[40] Basic Law of May 23, 1949, Articles 20 (1) and 3 (1); an English translation is published in: Amos J. Peaslee, Constitutions of Nations, 3d ed., vol. III, at 357 et seq. (1968).

[41] Bundesverfassungsgericht, Ruling of April 29, 1980, 54 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, at 124-25.

withdraw the application for commercial reasons,[42] and in another case, that the judge himself should, in the absence of the party, have postponed the auction for the same reason.[43] In a case concerning social security procedures, the Federal Constitutional Court argued that the failure of the statute to provide for advocatorial assistance was compensated by the courts controlling by themselves the process of taking evidence.[44]

There is another interrelated point of constitutional law explaining the German emphasis on "judicial sovereignty": the principle of proportionality. Proportionality is among the most frequently applied rules of constitutional law. It derives from the "Rechtsstaatsprinzip," the German equivalent to the due process clause, and its requires measures that interfere with private rights to be strictly limited to situations in which interference is both unavoidable and justifiable in view of reaching certain legitimate objectives.[45] The objective in this context is to hear and to decide upon a private claim submitted to private litigation. Under the principle of proportionality, therefore, the rights of personal privacy, commercial property, and business secrets may not be interfered with unless such interference is necessary to protect other persons' rights in the course of civil

[42] Bundesverfassungsgericht, Ruling of March 24, 1976, 42 BVerfGE 64, at 78-79.

[43] Bundesverfassungsgericht, Ruling of April 24, 1979, 51 BVerfGE 150, at 156 et seq.

[44] Bundesverfassungsgericht, Ruling of January 22, 1959, 9 BVerfGE 125, et seq.; cf. also Bundesverfassungsgericht, Ruling of July 25, 1979, 52 BVerfGE 131, at 144 et seq. and Bundesverfassungsgericht, Judgment of July 1, 1980, 54 BVerfGE 237, at 273.

[45] For a recent discussion, with further references to doctrine and court practice, see Klaus Vogel/Wolfgang Martens, Gefahrenabwehr, 9th ed., at 389 et seq. (1986).

litigation.[46] As seen from this angle, court control of taking evidence is again required, else the taking of evidence could be too broad and would turn into discovery unrelated to the particular claim. It has to be emphasized, however, that the evidence that is really necessary for bringing a plausible claim may in most circumstances be freely taken, of course under court control. The comparison of privileges under German law and under U.S. law is not at issue.[47] The real issue is that in Germany the judge has to protect individuals against unnecessary attempts of disclosure and to grant whatever absolute privileges may be applicable.

To sum up, no objections against the substance of the product liability suits having been raised, at present it is only Germany's "judicial sovereignty" that is at stake. Yet Germany's judicial sovereignty is affected to a considerable extent. German defendants, and deponents and expert witnesses living in Germany, are being exposed to procedures of taking evidence which are in conflict not only with the German law and practice of civil procedure, but also with basic constitutional notions, such as the welfare function of the judiciary and the maintenance of proportionality in civil litigation. Both opinions under review, it is submitted, suffer from a failure to understand the dignity of those interests forming part of German judicial sovereignty.

b) United States Interests.

It naturally is within the interests of the U.S. to allow its courts to deal with any claims properly brought be-

[46] Karl Heinz Schwab/Peter Gottwald, Verfassung und Zivilprozess, at 67 (1984); proportionality being an undisputed guideline under German public law, there has not yet been any need for an extensive discussion of its application to civil procedure.

[47] As to this point, see Peter Schlosser, Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen, 94 Zeitschrift für Zivilprozessrecht, 369 passim (1981).

fore them in such a way as to be as close as possible to objective truth. In Anschütz, the court of appeals repeatedly stated that it saw no reason to confine discovery as against a defendant subject to its personal jurisdiction merely for the reason of the defendant's foreign nationality or of the foreign location of the evidence.[48] Similarly the court in Messerschmitt took note of the "American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court."[49]

From the U.S. point of view, administration of justice indeed does not protect either Anschütz or Messerschmitt against any taking of evidence just because of their foreign nationality or of the foreign location of the evidence. But whether such protection will be granted would have to be examined in view of the availability of alternative means to obtain the evidence necessary to establish the facts relevant for a disposition of the claims. As has been elaborated above,[50] Convention procedures give access to the necessary evidence located in Germany. To be sure, using the channels of the Hague Evidence Convention may seem more cumbersome to the American plaintiff. But that option cannot be ignored when it comes to an accommodation of interests as it will be explained in the following Subsection.

c) Accommodating German and United States Interests.

In the instant cases, a compromise could be reached by proceeding in two different phases: If, in a first phase, Convention procedures were used, German interests in judicial sovereignty would be fully respected while U.S. interests in obtaining the necessary evidence would either be met as well, if the litigation is concluded, or would,

[48] Anschütz, at 609, 611 et seq.

[49] Messerschmitt, at 732.

[50] Supra at 7a-15a of this opinion.

if no conclusion is reached, at most be suspended temporarily. U.S. courts could always, in a second phase, be asked to protect remaining U.S. interests by taking such measures as may then be necessary in order to have the evidence transferred from Germany into the U.S.

The court of appeals in Anschütz was quick in rejecting a second balancing under comity principles since it believed such balancing would always be in favor of the U.S. and would therefore constitute "the greatest insult to a civil law country's sovereignty." [51] The court's conclusion is, it is submitted, not warranted, since it rests on the wrong assumption that using the channels of Convention would lead to nowhere. Experience tells, however, that upon using the Convention procedures the situation is likely to be quite different from what it is now.

The whole issue might, for various reasons, have become moot by then. The depositions could have produced sufficient information to go to trial. Or plaintiff could be prepared to drop the claim or to settle. If plaintiff felt the need of continuing discovery in order to prepare trial, the issues would nevertheless have been clarified to some extent. Requests for further information under the Convention could be formulated more precisely. Above all, production of reasonably identifiable documents could be prepared for the trial stage.

In view of the broad spectrum of possible developments, going through a first phase of using Convention procedures does make sense even to the U.S. U.S. plaintiffs will just have to overcome their natural antipathy against using procedures unfamiliar to them. Their interest in obtaining the necessary evidence being granted, allowance for different procedures must be made if evidence is located abroad. Equal treatment of domestic and

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[51] Anschütz, at 613.

foreign evidence means to provide an equal chance in adequately reaching the overall objectives of civil litigation. It does not suggest undiscriminate application of the same rules to situations as different as those.

Furthermore, such "enlightened" interpretation of domestic interests [52] would also have to take into account the possibility of adverse reaction on the part of the foreign state in question. The U.S. might not mind U.S. defendants being exposed to a taking of evidence outside the channels of the Convention. Yet, there may be other reactions. The United Kingdom, for instance, has demonstrated that foreign defendants in U.S. lawsuits could, in the foreign state, be provided with a basis for reclaiming there whatever they were coerced to grant in the U.S.[53] Germany would certainly be most reluctant to engage in such retaliatory action. But it is not Germany alone that is involved in disputes regarding domestic taking of evidence from abroad. It may, therefore, be worthwhile to remember that the balance of power as it is presenting itself in the instant cases could well be changed in favor of the foreign party since, in view of the worldwide spread of commercial property, enforcement would raise no serious problems.[54]

To sum up, in both Anschütz and Messerschmitt, German and U.S. interests are to be reconciled by going through the Convention channels first and, if at all necessary, by coming back to the question later whether and to what extent U.S. courts should, by themselves, order the taking of evidence from Germany.

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[52] Cf. Meessen, Antitrust Jurisdiction (note 26), at 798 et seq.

[53] For a recent survey cf. Gary B. Born, Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation, 26 VirgJInt'lL 91 (1985/1986).

[54] For the related point of U.S. enforcement of U.S. orders see above at 5a.

V. Conflict Avoidance Under Comity Principles

Regarding state jurisdiction, international law only provides for a minimum standard which every state has to respect. Normally, states keep clear of any violation of that minimum standard by applying national rules of conflict laws which are tailored to the needs of each particular state. Comity has always been the primary instrument of U.S. law to avoid international conflicts likely to generate violations of international law. It would, therefore, be by applying comity principles that the U.S. could avoid violating the above rule of international law on the accommodation of interests of foreign states.

The U.S. principles of comity seem to be sufficiently open to permit U.S. courts to assess properly the weight of German judicial sovereignty and to reassess U.S. interests in view of the availability of Convention procedures in the instant cases. This writer, therefore, is confident that a realistic application of comity principles will make unnecessary any direct reference to international law. If, however, applying comity principles does not first suggest exhausting Convention procedures, such result would have to be reached by applying international law as the law of the land, lest the United States be exposed to international responsibility vis-a-vis the Federal Republic of Germany.

Chicago, Illinois, March 31, 1986

Karl M. Meessen